Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-864

J. EDWIN LA VALLEE, Superintendent, Clinton Correctional Facility,

Petitioner,

against

AMERICO LLUVERAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, J. Edwin La Vallee, Superintendent of Clinton Correctional Facility, Dannemora, New York, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered herein on September 19, 1975.

Opinions Below

None of the opinions below are reported. The judgment of the Court of Appeals (1a)* was rendered without written opinion. In announcing the decision of the Court, the presiding judge, Hon. William C. Timbers stated that the Court had determined that the findings of the District Court were not clearly erroneous, citing *Mosher* v. *LaVal-*

* Numbers in parentheses followed by "a" refer to pages of the appendix hereto.

lee, 491 F.2d 1346, 1347 (2d Cir.), cert. den. 416 U.S. 906 (1974); and furthermore, that the admission of expert testimony on behalf of respondent Lluveras was within the discretion of the Court. The opinion of the District Court sustaining the writ of habeas corpus appears at (4a). The order and judgment entered thereon appears at (2a). The order of the Court of Appeals directing an evidentiary hearing appears at (13a). The memorandum and order of the District Court initially dismissing the petition for habeas corpus appears at (14a). The opinion of the Supreme Court, New York County denying *coram nobis* rendered June 22, 1966 appears at (16a).

Jurisdiction

The judgment of the Court of Appeals was entered on September 19, 1975. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Question Presented

Whether the decision of the Court of Appeals conflicts with this Court's opinion in *LaVallee* v. *Delle Rose*, 410 U.S. 690 (1973)?

Statutory Provision Involved

28 U.S.C. § 2254(d) provides in pertinent part:

> [A] determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction * * * evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear * * *
>
> (c) that the merits of the factual dispute were not resolved in the State court hearing.

Statement of the Case

The Court of Appeals for the Second Circuit has summarily affirmed the judgment herein of the District Court for the Southern District of New York sustaining a writ of habeas corpus after an evidentiary hearing.

At the time of the Court of Appeals decision, respondent was on parole from three concurrent prison sentences of ten to thirty years imposed on him by the former Court of General Sessions of New York County (now merged into the Supreme Court), Hon. Irwin D. Davidson, J., on March 1, 1961. A jury had found him guilty of three counts of robbery, first degree (N.Y. Penal Law of 1909 § 2124) as charged in Indictment No. 4546/1960. The conviction was affirmed, 19 A D 2d 525, 240 N.Y.S. 2d 364 (1st Dept. 1963), and leave to appeal to the New York Court of Appeals pursuant to former N.Y. Code of Crim. Pro. § 520 was denied on July 9, 1963 (FULD, J.), cert. den., 380 U.S. 986 (1965).

Following the decisions of this Court in *Jackson* v. *Denno,* 378 U.S. 32 (1964) and of the New York Court of Appeals in *People* v. *Huntley,* 15 N Y 2d 72, 204 N.E. 2d 176, 255 N.Y.S. 2d 838 (1965), respondent instituted a *coram nobis* proceeding challenging the voluntariness of certain confessions and admissions introduced against him at trial. The "Huntley" hearing was held before Mr. Justice Davidson beginning May 6, 1966, and the motion was denied on June 22, 1966. The Court found that:

> "Petitioner's testimony was replete with false and untrue statements and manufactured charges of brutality. I find that his testimony is entirely unworthy of belief, and is completely incredible.
>
> "I find from all the testimony both at the hearing and at the trial that the People have sustained the burden of establishing that the statements which the petitioner made to the police and to the District Attorney were freely and voluntarily made. I find be-

> yond a reasonable doubt that the statements were not the product of polic brutality, coercion, either mental or physical, or any other improper conduct exerted by the police against the petitioner. I find beyond a reasonable doubt that no constitutional rights, or other rights secured to the petitioner were violated." (18a-19a)

The Appellate Division affirmed, without opinion, 31 A D 2d 892, 299 N.Y.S.2d 100 (1st Dep't 1969), and leave to appeal to the New York Court of Appeals, *id.* § 520, was denied on March 20, 1969 (FULD, Ch. J.). Certiorari was denied *sub nom. Lluveras* v. *New York,* 396 U.S. 457 (1969).

On February 4, 1971, respondent filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. As he had alleged in the state courts, respondent claimed in his *pro se* application that his confession had been the product *inter alia* of his discomfort from heroin withdrawal.

The petition was dismissed by the District Court on March 2, 1971. The court held that

> "Petitioner now presents the same claims presented at the Huntley hearing. Although he claims that police detectives testifying at that proceeding gave perjured and misleading testimony, he offers no evidence to substantiate that claim. The court has carefully considered the transcript of that hearing and finds that it was full, fair and complete, and in accordance with the requirements of *Townsend* v. *Sain,* 372 U.S. 293, 318 (1963). Petitioner's claims regarding his right to counsel prior to questioning are well settled by *Johnson* v. *New Jersey,* 384 U.S. 719 (1966) which holds *Miranda* v. *Arizona,* 384 U.S. 436 (1966) to be nonretroactive.

It appears, therefore, that petitioner has presented no claim cognizable by this court. The petition must be denied." (14a-15a)

However, on September 30, 1971, the Court of Appeals for the Second Circuit, acting upon respondent's application for a certificate of probable cause, summarily remanded the proceeding to the District Court to conduct a hearing into the voluntariness of the confession (13a).

The hearing before the District Court, held on November 21, 1974 was confined by respondent's counsel to the alleged effect of narcotic withdrawal upon the voluntariness of his confession (6a). To bolster respondent's own testimony, he offered the testimony of character witnesses and the testimony of a psychiatrist who was experienced in the treatment of heroin addicts (9a). The State trial judge had ruled that expert medical testimony would be excluded by reason of respondent's failure to lay a proper foundation for hypothetical questioning, Huntley Hearing Minutes, pp. 177-178.

The evidentiary hearing had been directed by the Court of Appeals prior to this Court's ruling in *LaVallee* v. *Delle Rose, supra.* Petitioner contended before the Court of Appeals that in the light of *Delle Rose,* the hearing should never have been held, br. pp. 14-15.

Reasons for Granting the Writ

The Court of Appeals for the Second Circuit, in summarily affirming the judgment of the District Court has reached a decision contrary to this Court's ruling in *LaVallee* v. *Delle Rose, supra.* Without attempting to distinguish *Delle Rose* from the instant case, it has effectively ignored the principles of comity and respect for state court findings that is mandated by statute, 28 USC § 2254(d) and articulated in the *Delle Rose* opinion as well as in the

earlier case of *Townsend* v. *Sain,* 372 U.S. 293, 318 (1963). The Court of Appeals has thereby created a conflict within the Circuits that requires resolution in this Court.

The result reached conflicts most notably with the well reasoned decision of the Third Circuit in *United States ex rel. Hayward* v. *Johnson,* 508 F.2d 322, 329 (3d Cir.), cert. den. 422 U.S. 1011 (1975), a case which bears a marked resemblance to the case at bar, there

> the only asserted deficiency in the [state] hearing was the failure to hear medical testimony which might corroborate [relator's] assertion that the fear of oncoming withdrawal was so great as to render his confession involuntary.

Neverthless, the Third Circuit, relying upon *Delle Rose* held the relator had failed to show that he had become violently ill until after he had confessed. As in the instant case, he had failed to provide a proper foundation for expert testimony.

The cases of *Whitaker* v. *Estelle,* 509 F2d 194, 197 (5th Cir. 1975), *Stidham* v. *Swenson,* 506 F2d 478, 489 (8th Cir. 1974), cf. *Lee* v. *Hopper,* 499 F2d 456, 462, f.n. 5 (5th Cir.), cert. den. 419 U.S. 1053 (1974), *Berry* v. *Cowan,* 497 F2d 1274, 1275 (6th Cir. 1974), are additional examples of other Courts of Appeal fully observing the *Delle Rose* decision by this Court.

Respondent received a full and fair hearing in the state court as that requirement is contemplated in 28 U.S.C. § 2254(d). Moreover, the state trial judge applied a standard even stricter than the "totality of the circumstances" rule for determining the voluntariness of confessions made prior to *Miranda* v. *Arizona,* 384 U.S. 436 (1966), see *Davis* v. *North Carolina,* 384 U.S. 737, 740 (1966) and *Lego* v. *Twomey,* 404 U.S. 477, 489 (1972). Although medical testimony was never presented at the state hearing, this was

due to respondent's failure to offer the same and to offer a proper foundation for expert evidence. Indeed, respondent's attempt to offer expert evidence was confined to eliciting opinions from the assistant district attorney who had interviewed the respondent and to a request that the court take judicial notice of the effects of heroin withdrawal upon a suspect in custody, Hearing Minutes, pp. 176-178. Yet despite its application of undeniably correct legal standards, the findings of the state court as affirmed on appeal, were ignored, and the Court of Appeals has sanctioned the result of the District Court's independent inquiry.

Unfortunately, this case does not present an isolated instance of a failure by the Second Circuit to observe the *Delle Rose* decision. As one Circuit Judge put it:

> The [Supreme] Court's recent reversal of this Court in LaVallee v. Delle Rose * * * emphasizes our obligation to recognize the state courts as coequal and not inferior tribunals.

Mulligan, C.J., dissenting in *United States ex rel. Williams* v. *LaVallee,* 487 F.2d 1006, 1017 (2d Cir. 1973), cert. den. 416 U.S. 916 (1974). Further corrective action by this Court is thus necessary.

CONCLUSION

The writ of certiorari should be granted and the judgment of the Court of Appeals vacated with directions to remand this cause to the District Court for dismissal.

Dated: New York, N. Y.
December 16, 1975

Respectfully submitted,

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Order of Affirmance of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of September one thousand nine hundred and seventy-five.

Present: HON. HENRY J. FRIENDLY,
HON. WILLIAM H. TIMBERS,
HON. MURRAY I. GURFEIN,
Circuit Judges.

75-2071

UNITED STATES ex rel. AMERICO LLUVERAS,
Petitioner-Appellee,

v.

J. EDWIN LAVALLEE, Superintendent, Clinton Correctional Facility,
Respondent-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk.

By VINCENT A. CARLIN,
Chief Deputy Clerk.

FILED
September 19, 1975

Judgment of the District Court.

U. S. District Court

Filed
Mar 21 1975

S. D. of N. Y.

Order

71 Civ. 493

ELP

UNITED STATES DISTRICT COURT

Southern District of New York

United States of America ex rel. Americo Lluveras,

Relator,

against

Hon. J. Edwin La Vallee, Superintendent, Clinton Correctional Facility, Dannemora, New York,

Respondent.

This proceeding have duly come on for a hearing on November 21, 1974 and due deliberation thereon having been had and the Court having rendered and filed its opinion; it is

Ordered and Adjudged that the petition for a writ of habeas corpus herein be and the same is hereby granted, that the judgment of conviction upon a jury verdict for

robbery in the first degree, three counts, of the former Court of General Session of New York County, dated March 1, 1961, be and the same is hereby vacated, and set aside, and that the Relator be and it is hereby directed that he be discharged from the custody of the New York State Division of Parole Unless retried in Supreme Court, New York County on Indictment No. 4546/1960 within sixty (60) days hereof; and it is

ORDERED, that if a timely notice of appeal is filed on behalf of respondent, this order and judgment of the Court herein shall be stayed pending determination thereof.

Dated: New York, New York, March 21, 1975.

EDMUND L. PALMIERI
U. S. D. J.

Opinion of the District Court.

E.P. Civ 98 Opin 543

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

71 Civ. 493
(ELP)

UNITED STATES OF AMERICA ex rel. AMERICO LLUVERAS,
Petitioner,

against

J. EDWIN LA VALLEE, Warden, Clinton Correctional Facility,
Respondent.

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U. S. District Court
FILED
FEB 26 1975
S. D. of N. Y.

Opinion of the District Court.

PALMIERI, J.

This is a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner seeks to vacate his conviction on the ground that the confession received against him at trial was involuntary because obtained while he was undergoing narcotic withdrawal. For reasons hereinafter stated the motion is granted.

I. PRIOR PROCEEDINGS

On December 15, 1960, Americo Lluveras was convicted after a jury trial in the Court of General Sessions of New York County of three counts of first degree robbery, and sentenced on March 1, 1961, to three concurrent sentences of 10 to 30 years in the State Prison. Lluveras served twelve years and is now on parole.

The conviction was appealed unsuccessfully, *People* v. *Lluveras,* 19 A.D.2d 525, 240 N.Y.S.2d 364 (1st Dep't 1963), *leave to appeal denied* (July 9, 1963, Fuld, J.), *reapplication denied* (January 19, 1965, Fuld J.), *cert. denied,* 380 U.S. 986 (1965).

On September 21, 1965, Lluveras filed a petition in the Supreme Court of New York County for a writ of *coram nobis,* alleging *inter alia* that his confession was inadmissible because obtained by coercion. After a Huntley hearing at which the State court refused to permit expert medical testimony on the effect of narcotic withdrawal upon the voluntariness of a confession, the petition was denied in an opinion of June 22, 1966, Davidson, J., and an order entered to that effect on July 29, 1966.

This order was also appealed unsuccessfully. *People* v. *Lluveras,* 31 A.D.2d 892, 299 N.Y.S.2d 100 (1st Dep't 1969), *leave to appeal denied* (March 20, 1969, Fuld, C.J.), *reapplication denied* (June 19, 1969, Fuld, C.J.), *cert. denied* 396 U.S. 994 (1969).

Having exhausted his state remedies, Lluveras on February 4, 1971, filed a petition for a writ of habeas corpus in this court, alleging substantially the same claims set forth in the state *coram nobis* proceeding. We dismissed the petition without a hearing in a memorandum endorsement filed June 2, 1971, *United States ex rel. Lluveras* v. *La Vallee,* Pro Se 71 Civ. 493, on the ground that petitioner's charges that his confession was induced by force, threats and coercion, that he was not advised of his right to remain silent, and that he was not advised of his right to counsel, had been fully and fairly considered at the Huntley hearing.

An appeal was taken from this order to the Court of Appeals, which, on September 30, 1971, vacated the dismissal and directed the District Court to conduct an evidentiary hearing on the issue of the voluntariness of Lluveras' confession.

The sole point pressed at this hearing was that at the time he confessed petitioner was undergoing narcotic withdrawal so severe as to render his confession involuntary.

II. Statement of Facts

On May 4, 1960, Lluveras became aware that detectives were looking for him at his home, whereupon he went to the home of friends and spent the night taking drugs. After breakfast on the morning of May 5, 1960, at about 10:00 a.m., Lluveras telephoned his mother and learned that the police were still at his home. He spoke to one of the officers and upon being told that he was wanted for questioning said that he would go straight to the police station himself. Instead, he returned to his friends and took a heroin injection at about noon. In the early afternoon Lluveras called the officers at his mother's house and advised them that he was coming home. At about 3:00

p.m. he returned home, had a glass of milk and some cake or pie, and went with the officers to the police station, where he arrived at approximately 4:30 p.m. He was not questioned immediately but remained in a waiting room for several hours.

Lluveras testified that he began to feel edgy at about 5:00 p.m. and finally at about 6:30 p.m., feeling the effects of his noon heroin injection rapidly wearing off, asked if he might leave and return, his intention being to take another injection. He was not permitted to leave but was interrogated intermittently throughout the night until at 8:00 a.m. a seventy page formally transcribed "question and answer" (hereinafter Q & A) statement, lasting an hour and a half, was taken by an Assistant District Attorney. Throughout the seventeen hours of confinement and interrogation petitioner had no food, drugs or sleep. During this interrogation petitioner confessed to a large number of crimes, including apparently some he did not commit, *infra*. His confession recorded in the Q & A was received against him at trial. At no time during the night did the police advise Lluveras of his right to remain silent or to have an attorney, nor did they warn him that his statements would be used against him. The Assistant District Attorney did not advise Lluveras of any rights during his preliminary questioning. At the start of the formal Q & A at 8:00 a.m. he advised Lluveras of his right to remain silent, which was the first and only warning Lluveras received as to any of his rights.

That Lluveras was a heavy user of narcotics was a fact known to the police, who included it in the alarm issued shortly prior to petitioner's arrest. At the time of this interrogation Lluveras had been deeply addicted to narcotics for approximately six years. He had been introduced to drugs as a young teenager and began to take heroin by intravenous injection at the age of sixteen. Peti-

tioner was hospitalized for five months in 1956 after an arrest for heroin possession, and imprisoned for three years from 1956 to 1959 and one month in 1959, but quickly returned to his habit after each release. At the time of this arrest Lluveras was taking up to five heroin injections a day on a $25-$40 a day habit. At the State *coram nobis* hearing both arresting officers testified that they had observed during their interrogation that petitioner was experiencing withdrawal, although they differed with petitioner as to the severity of his symptoms.

III. Discussion

At the threshold the parties are divided as to which side bears the burden of proof. We find that we need not resolve this issue, for even if the burden is cast upon petitioner, he has satisfied the totality of the relevant circumstances test by which the voluntariness of his 1960 confession must be judged. *Culombe* v. *Connecticut,* 367 U.S. 586, 600 (1960); *Davis* v. *North Carolina,* 384 U.S. 737, 740 (1966); *United States ex rel. Ward* v. *Mancusi,* 414 F.2d 87, 89 (2d Cir. 1969).[1]

This case presents a very close and difficult factual issue. At a distance of nearly fifteen years from the events in question we cannot say with certainty what occurred. Unfortunately, the seventy page Q & A taken the morning after the night of interrogation, which would help us to gauge Lluveras' condition at the time he made the confession received against him at trial, has been lost by the State and we are dependent upon the few brief excerpts from it quoted in the Huntley hearing transcript. Nevertheless, the following picture emerges.

On May 5, 1960, petitioner, a known addict, took his last injection of heroin at about noon. He had breakfasted at about 9:30 a.m. and eaten a light snack at 3:00

p.m. He arrived at the police station at about 4:30 p.m. and remained there until his interrogation began several hours later. Questioning continued intermittently throughout the night until 8:00 a.m. when a formal Q & A lasting an hour and a half was taken. During this entire period from 4:30 p.m. to 9:30 a.m. Lluveras had no drugs, no food and no sleep. Seven hours elapsed between petitioner's last injection and the beginning of his questioning, at which time the effects of that injection were already wearing off. Petitioner testified that during that night he underwent all the symptoms typically associated with narcotic withdrawal; jittery restlessness, yawning and twitching, running nose, watery eyes, cold chills, severe abdominal cramps, nausea, vomiting, diarrhea and hot and cold sweats.

Lluveras' testimony as to his physical symptoms was confirmed by the expert testimony of Dr. Milford Blackwell. Dr. Blackwell, a psychiatrist presently associated with the State of New York, Department of Social Services, Office of Vocational Rehabilitation, has had ten years of wide experience in the treatment of drug addiction, and was for eight years Clinical Instructor in Neurology at the New York University Medical College. Dr. Blackwell testified that he had taken petitioner's medical history and that there were needle tracks in his arms corroborating a long history of insertion of needles in his veins. The doctor stated that someone on a $30 a day habit would begin to experience withdrawal within six or seven hours of his last injection and that the symptoms would become progressively more debilitating as deprivation continued. It was his opinion that these symptoms combined with the element of fatigue during a period of prolonged interrogation would render a confession obtained under these circumstances involuntary, due to the subject's desire to placate his questioners by saying what was expected in order to get some relief and end the interrogation.

The Huntley hearing transcript and the Q & A quotations therein provide some corroboration for Dr. Blackwell's thesis. Lluveras testified that he was shown a list of crimes and confessed to them all, but was then told that some had occurred while he was incarcerated. He also attempted to confess to a murder which he did not commit. The State presses the fact that he ultimately did not confess to the murder as proof that his will was not overborne. However, it appears that Lluveras tried to confess but when he could not describe the place where the murder occurred or give any details, he finally said that he could not admit it.

We find then, that the confession received against petitioner was given after he had been without sleep for twenty-four hours, without food for eighteen hours (having eaten only lightly before that), and without drugs for nearly twenty-one hours. Set against his prolonged confinement and questioning, Lluveras' weakened condition from lack of food and sleep coupled with the pains of withdrawal which, given the depth and duration of his addiction cannot have been inconsiderable, persuade us that his confession was not "the product of a rational intellect and free will," *Blackburn* v. *State of Alabama*, 361 U.S. 199, 208 (1959), but rather the product of a "will . . . overborne," *Rock* v. *Pate*, 367 U.S. 433, 440 (1960), and therefore constitutionally inadmissible.

In finding for petitioner we do not profess to underwrite his credibility on every issue, nor is it our intention to make light of the good faith of the police or their efforts in this case.

We also do not intend to suggest parameters for future cases of this kind. Drug addicts are quite capable of giving reliable testimony, as this Court has had frequent occasion to observe. We are dealing here with a period of withdrawal and although many courts have recognized that

the painful symptoms of withdrawal may invalidate a confession obtained under their influence "[t]here is no *per se* rule mandating that confessions made under such circumstances are inadmissible." *United States* v. *Arcodiano*, 371 F. Supp. 457, 466 (1974). *Compare Ortiz* v. *United States*, 318 F.2d 450 (9th Cir. 1963), *cert. denied* 376 U.S. 953 (1964); *United States ex rel. Sadler* v. *Com. of Pa.*, 306 F. Supp. 102 (D. Pa. 1969), *aff'd*, 434 F.2d 997 (3d Cir. 1970); and *United States* v. *Young*, 355 F.Supp. 103 (1973), upholding statements made in the course of withdrawal, *with United States ex rel. Collins* v. *Maroney*, 287 F. Supp. 420, 422-23 (E.D. Pa. 1968) wherein the confession of a heavy drug user made eighteen hours after his last injection was found not voluntary, and his eighteen year old conviction vacated. Implicit in the "totality of the relevant circumstances" test of voluntariness, *supra*, is the requirement that each case be closely scrutinized and decided on its own facts. Among the factors to be considered in assessing these facts are "the length, intensity and frequency of interrogation; [and] the existence of physical deprivation or mistreatment . . .." *Brown* v. *United States*, 356 F.2d 230, 232 (10th Cir. 1966). In the present case it is the totality of the effects of lack of sleep, lack of sustenance, and mounting withdrawal pains coupled with a long confinement and interrogation which compel our finding that petitioner's confession was not voluntary.

The excellent representation of petitioner by appointed counsel is gratefully acknowledged.

The petition is granted.[2] It is so ordered.

Dated: New York, N. Y.
February 25, 1975

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EDMUND L. PALMIERI
U. S. D. J.

FOOTNOTES

[1] The holdings of *Escobedo* v. *Illinios*, 378 U.S. 478 (1964) and *Miranda* v. *Arizona*, 384 U.S. 436 (1966), are not retroactive, *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), and therefore not relevant to the 1960 confession here in issue.

[2] If counsel for the petitioner seeks a more formal order, it should be submitted on notice.

Order of the Court of Appeals Remanding for Hearing, Filed September 30, 1971.

UNITED STATES COURT OF APPEALS
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirtieth day of September, one thousand nine hundred and seventy-one.

71 Civil 493

United States ex rel. Americo Lluveras,
Relator,

v.

J. Edwin LaVallee, Warden of Clinton Correctional Facility, Dannemora, New York,
Respondent.

A motion having been made herein by relator pro se for a certificate of probable cause, for leave to proceed in forma pauperis, and for the assignment of counsel.

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted to the extent that the judgment dismissing the writ is vacated and the district court is directed to conduct an evidentiary hearing on the issue of the voluntariness of Lluveras' confession.

HENRY J. FRIENDLY
WILLIAM H. MULLIGAN
WILLIAM H. TIMBERS
Circuit Judges

Memorandum Decision of the District Court Dismissing Petition for Habeas Corpus, Filed June 2, 1971.

U.S.A. ex rel. Lluveras v. *LaVallee, PRO SE 71 Civ. 493*

JUNE 1, 1971:

Petitioner is presently serving three concurrent prison sentences of 10-30 years following a jury conviction of 3 counts of robbery in the Court of General Sessions of New York County. The conviction was affirmed, 19 A.D.2d 525 (1st Dept. 1963), and leave to appeal to the New York Court of Appeals was denied on July 9, 1963. Following the decisions of the United States Supreme Court in *Jackson* v. *Denno*, 378 U.S. 32 (1964) and the New York Court of Appeals in *People* v. *Huntley*, 15 N.Y.2d 72 (1965), petitioner instituted a coram nobis proceeding challenging the voluntariness of certain confessions and admissions introduced against him at trial, claiming that these had been obtained by force, threats, and coercion, that he was not advised of his right to remain silent, and that he was not advised of his right to counsel. Mr. Justice Davidson denied the petition on June 22, 1966, finding beyond a reasonable doubt that "the statements which the petitioner made to the District Attorney were freely and voluntarily made . . . . [and] that the statements were not the product of police brutality either mental or physical, or any other improper conduct exerted by the police against the petitioner." This decision was affirmed by the Appellate Division, 31 A.D.2d 892 (1st Dept. 1969), and leave to appeal to the Court of Appeals was denied March 20, 1969. Certiorari was denied *sub nom. Lluveras* v. *New York*, 396 U.S. 457 (1969).

Petitioner now presents the same claims presented at the Huntley hearing. Although he claims that police detectives testifying at that proceeding gave perjured and misleading testimony, he offers no evidence to substantiate

that claim. The court has carefully considered the transcript of that hearing and finds that it was full, fair and complete, and in accordance with the requirements of *Townsend* v. *Sain,* 372 U.S. 293, 318 (1963). Petitioner's claims regarding his right to counsel prior to questioning are well settled by *Johnson* v. *New Jersey,* 384 U.S. 719 (1966) which holds *Miranda* v. *Arizona,* 384 U.S. 436 (1966) to be nonretroactive.

It appears, therefore, that petitioner has presented no claim cognizable by this court. The petition must be denied.

No certificate of probable cause (28 U.S.C. § 2253) will issue because there is no point of any substance to be raised on appeal. In respect to the *in forma pauperis* statute (28 U.S.C. § 1915(a)), it is certified that any appeal from this order is not taken in good faith. In this context good faith is judged by an objective standard, and, if an appeal is frivolous, it is not taken in good faith. *Coppedge* v. *United States,* 369 U.S. 438, 445 (1962); *United States* v. *Visconti,* 261 F.2d 215, 218 (2d Cir. 1958), *cert. denied* 358 U.S. 954 (1959).

It is so ordered.

EDMUND L. PALMIERI
U. S. D. J.

Opinion of the Supreme Court, New York County, Denying Coram Nobis.

In denying the petition at the close of the *Huntley* hearing, DAVIDSON, J., delivered the following opinion, dated June 22, 1966:

> "Petitioner moves by writ of error coram nobis for a hearing pursuant to *People* v. *Huntley*, 15 N.Y.2d 72, claiming that confessions and admissions introduced in evidence at his trial had been obtained from him by force, threats and coercion exerted by the police; that he was not advised of his right to remain silent, or that if he made a statement it might later be used against him, and he was not advised that he could consult with a lawyer.
>
> "Petitioner was convicted of three counts of robbery in the first degree and was sentenced on the 1st day of March, 1961 to State Prison for a term of not less than ten and not more than thirty years. The conviction was affirmed by the Appellate Division 19 A.D. 2d 525.
>
> "On May 5, 1960, petitioner surrendered himself to the police at about 5:00 P.M. He was questioned by the police respecting the robbery of which he was convicted, as well as approximately twenty other holdups in which it was claimed the petitioner participated. He also was questioned about his alleged participation in a holdup-murder which occurred at the Parkview Hotel. During the course of the interrogation, several victims of the holdups were brought into the precinct for the purpose of ascertaining whether a witness could identify the petitioner as a participant in the shooting which had occurred there.
>
> "During the early morning hours of May 6, 1960, when petitioner was questioned by Assistant District

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Attorney Sandler, he fully and freely admitted to participating in several robberies. However, he never admitted to participating in the stickup and killing which occurred at the Parkview Hotel. When Assistant District Attorney Sandler spoke to petitioner he saw no visible marks on him, nor did petitioner say he needed or wanted a doctor.

"Petitioner claims that the police knew that he was heavily addicted to narcotic drugs, and that at the time of the questioning he was in fact visibly suffering withdrawal symptoms, that he experienced cramps in his stomach, nausea, dizziness and he pleaded with the police not to beat him because, as a narcotic addict, he could not tolerate any beating. He claims despite such plea the police nevertheless brutally beat him about the head, face and ribs, that he was struck with a rubber hose and kicked in the head while writhing around on the floor. He claims that he was hung out of the bathroom window by his heels, and, while so suspended, desperately sought to kick himself free hoping thereby to fall to the courtyard and suffer injuries serious enough for him to be taken to the hospital.

"He claims that the police offered to supply him with drugs if he would cooperate and give them the information which they sought. He testified at this hearing that he was so severely beaten and assaulted by the police that he pleaded with them to desist from beating him and that he would admit to anything, even murder. It is significant to point out that despite the alleged brutal beating to which he was subjected petitioner never admitted to participating in the murder, nor did the police claim that he ever made such admission.

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"The police and the District Attorney deny that they threatened, coerced, beat, struck or intimidated the petitioner in any manner whatsoever. Former Assistant District Attorney Sandler testified that the defendant freely admitted participating in the robbery of which he was convicted, as well as several other robberies. That before he obtained the Q & A statement from petitioner, he was told that he did not have to make any statement and if he did make a statement it might be used against him at a later time.

"The police questioning of the petitioner was not lengthy or continuous but was intermittent, to permit the police to bring to the precinct some of the victims of his crimes for confrontation purposes. The investigation involved approximately twenty different holdups, as well as a murder, all of which required time. Furthermore, when he spoke to Sandler he never told him that the police hung him by his heels out of the bathroom window, but he did make such a claim at the trial.

"The police deny that they promised to supply him with drugs and deny that they hung him by his heels out of the bathroom window. The police testified that the precinct bathroom window is covered by a permanent heavy gauge metal screen which makes it physically impossible to hang a person out of the window. The police deny that they ever refused to furnish him with food or water.

"Petitioner's testimony was replete with false and untrue statements and manufactured charges of brutality. I find that his testimony is entirely unworthy of belief, and is completely incredible.

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"I find from all the testimony both at the hearing and at the trial that the People have sustained the burden of establishing that the statements which the petitioner made to the police and to the District Attorney were freely and voluntarily made. I find beyond a reasonable doubt that the statements were not the product of police brutality, coercion, either mental or physical, or any other improper conduct exerted by the police against the petitioner. I find beyond a reasonable doubt that no constitutional rights, or other rights secured to the petitioner were violated.

"Petitioner's application is in all respects denied."